

January 23, 2004
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Glen Milner

Date of Filing: December 28, 2001

Case Number: VFA-0712

Glen Milner (the Appellant) filed an Appeal from a determination that the Office of the Navy (the Navy) issued on October 31, 2001. In that determination, the Navy denied in part a request for information that the Appellant submitted on March 25, 1999, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. In this Determination, the Navy released four documents. However, the Navy withheld portions of each document. That information was withheld as the result of reviews of the documents by the Department of Energy (DOE) Office of Declassification and the Navy, after which they determined that the documents contained classified information. This Appeal, if granted, would require the DOE to release the information that the DOE withheld from those documents.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b).

I. Background

On March 25, 1999, the Appellant requested “all information regarding the safety of Trident Missiles and Trident nuclear weapons . . . including W76 and W88 nuclear warheads.” The Navy responded to the request by identifying four responsive documents to the Appellant and releasing portions of each. However, the Navy withheld from release portions of each document pursuant to (1) the Navy’s determination that this information warranted protection from disclosure under Exemptions 1, 3 and 5 of the FOIA and (2) the DOE’s determination that some of the withheld information was classified and therefore warranted protection from disclosure under Exemption 3.

The present Appeal seeks the disclosure of the withheld information described above. In his Appeal, the Appellant contends that

[I]nformation was improperly withheld under the Freedom of Information Act. I believe that information was withheld or deleted that is neither in the interest of national defense or foreign policy, in the interest of the free and candid exchange of ideas, or exempted under atomic energy defense programs.

Appeal at 1.

II. Analysis

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); *see* 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. *See, e.g., National Security Archive*, 26 DOE ¶ 80,118 (1996); *Barton J. Bernstein*, 22 DOE ¶ 80,165 (1992); *William R. Bolling, II*, 20 DOE ¶ 80,134 (1990).

The Acting Director of the Office of Security (the Director), has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 00-030.00, Section 1.8 (December 6, 2001). Upon referral of this appeal from the Office of Hearings and Appeals, the Director reviewed those portions of the requested documents for which the DOE had claimed exemptions from mandatory disclosure under the FOIA.

According to the Director, the DOE determined on review that the withheld portions of the four documents contain information that has been classified as Restricted Data (RD) or Formerly Restricted Data (FRD) under the DOE's current classification guidance. Under the Atomic Energy Act of 1954, RD and FRD are forms of classified information, and are therefore exempt from mandatory disclosure under Exemption 3. The material that the DOE continues to withhold under Exemption 3 of the FOIA is identified in the margin of the documents as "DOE (b)(3)." The Director has also informed us that some of the material the DOE withheld from the documents may now be released. The denying official for the DOE's withholdings is Mr. Marshall Combs, Acting Director, Office of Security, Department of Energy. The Navy has also reviewed the four documents and determined that it will continue to withhold all of the information it previously withheld under Exemptions 1, 3 and 5. The denying official for the Navy's withholdings is Rear Admiral Alan S. Thompson, Director, Supply, Ordinance and Logistics Operations Division, Office of the Chief of Naval Operations. The material that the Navy continues to withhold under Exemptions 1, 3 and 5 is identified in the margin of the documents as "DON b(1)", "DON b(3)" or "DON b(5)."

Based on the Director's review, we have determined that the Atomic Energy Act requires DOE to continue withholding significant portions of the documents under consideration in this Appeal. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, such consideration is not permitted where, as in the application of Exemption 3, the disclosure is prohibited by executive order or statute. Therefore, those portions of the documents that the Director has now determined to be properly classified must be withheld from disclosure. Nevertheless, the Director has reduced the extent of the previously deleted portions to permit releasing the maximum amount of information consistent with national security considerations. Therefore, the DOE will release newly redacted versions of the four documents reviewed in this Appeal to the Appellant under separate cover. Accordingly, the Appellant's Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

- (1) The Appeal filed by Glen Milner on December 28, 2001, Case No. VFA-0712, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.
- (2) Newly redacted versions of the documents in which additional information is released will be provided to Glen Milner.
- (3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 23, 2004